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July 20, 1912.

MOTION PICTURE PATENTS COMPANY,
80 Fifth Avenue,
New York.

Gentlemen:-

Enclosed please find copy of letter addressed by M.B.Philipp and Francis T. Homer, Esquires, to the Honorable, the Attorney General of the United States, relative to the Federal investigation now pending, which we are forwarding to you by instructions of Mr. Homer.

Yours very truly,

Willis & Homer

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M E M O R A N D U M

FOR THE MOTION PICTURE PATENTS COMPANY AND THE GENERAL FILM COMPANY CONCERNING THE INVESTIGATION OF THEIR BUSINESS

BY

THE DEPARTMENT OF JUSTICE.

Submitted by

M. B. Philipp
and
Francis T. Homer.

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MEMORANDUM FOR THE MOTION PICTURE PATENTS COMPANY AND THE GENERAL FILM COMPANY CONCERNING THE INVESTIGATION OF THEIR BUSINESS BY THE DEPARTMENT OF JUSTICE.

To the Honorable Messrs. Wickersham, Fowler and Fowler Grosvenor,
Department of Justice,
Washington, D. C.

Dear Sirs:-

We would state that we have already presented to Mr. Grosvenor a memorandum endeavoring to correct various errors of fact and conclusions appearing in his report on such investigation down to his heading "Relations of the Eastman Kodak Company and the Motion Picture Patents Company."

In the present memorandum, which is made in accordance with your suggestion at our conference on the 9th instant, we shall as briefly as possible show that there has been no violation of the Sherman Act by either of said Companies or any one connected with them, repeating substantially what we said at such conference, and referring, as far as we may deem necessary, to the balance of Mr. Grosvenor's report.

September 9, 1908, the Motion Picture Patents Company, referred to hereafter as the Patents Company, was incorporated in New Jersey. Prior to this time there were

in force three sets of patents owned by different and antagonistic interests:

One set, first owned by Edison and then by the Edison Manufacturing Company, consisted of what we shall term the Edison Camera and Film Reissues, covering basic inventions in cameras to produce proper motion picture negatives, and also covering the positive motion pictures reproduced from such negatives, for use in projecting machines for giving exhibitions of such motion pictures.

Another set, owned by the American Mutoscope & Biograph Company, hereafter referred to as the Biograph Company, consisted of the Latham patent, covering basic inventions absolutely essential in motion picture projecting machines and also very important in cameras, the Prosa, and other patents covering important inventions in such projecting machines.

Another set, owned by the Armat Company, consisted of the Jenkins and Armat patent and a number of Armat patents covering inventions in projecting machines.

No manufacturer could successfully make motion pictures and dispose of the same without infringing the patents covering the camera and the motion picture film, and no one could make or use such motion pictures and a projecting

machine for exhibiting the same without infringing one or more of the two sets of patents covering projecting machines.

There had been, therefore, a large number of litigations arising under the patents of these three sets.

HISTORY OF THE MOTION PICTURE BUSINESS FROM ITS INCEPTION, THE INVENTIONS OF THE PRINCIPAL OF THE THREE SETS OF PATENTS; AND THE VARIOUS LITIGATIONS INVOLVING THE SAME.

Prior to the inventions by Edison of the Edison reissues, the Zoetrope, a mechanical toy, had been contrived and described as early as 1834, it having a rotating drum open at the top with vertical slots against which, on its inner side, were figures, in varying position, upon a strip of material. On rotating this drum rapidly, these figures could be seen through these vertical slots, appearing as moving objects, due to what is known as the persistence of visual impressions.

In France, DuCos obtained a patent in 1864 describing a series of lenses on an endless band moved past a slit through which light was reflected from the object to be photographed, the light acting on sensitized paper or plates attached to another band and moved by pins on the lens band.

For twenty-four years nothing was done with this invention, and the art was quiescent until 1888, when

Le Prince obtained an English and American patent for an extremely intricate apparatus having sixteen different lenses, making, in effect, sixteen different cameras, by means of which it was attempted to make a series of pictures on sensitized strips advanced for this purpose.

No one ever used the apparatus of either the DuCos or these LePrince patents for making negative motion pictures, and printing positives therefrom, the reason why being given in the records of the suits under the Edison reissues, to which we shall refer.

In the summer of 1889, Edison had reduced to practice the invention of his camera and film reissues and applied for his patent on the 24th day of August, 1891, and the patent was granted therefor August 31, 1897, No. 589,168.

The device of the camera of this patent operated on tape-like sensitized film "several hundred or even thousands of feet long", having a row of holes at its edges, such devices being capable of advancing the film as rapidly as from thirty to forty-six times a second so as to produce that many pictures on the film per second, the film being held at rest for nine-tenths of the time, and being moved during only one-tenth of the time for each picture. Thus, assuming thirty pictures were taken a second, the film was caused to rest for nine three-hundredths of a second, and advanced

during one three-hundredths of a second for each picture.

The Court of Appeals of the second Circuit (151 Fed. Rep. 767), in sustaining the first three claims of the Edison reissue, to which we will refer later on, said quoting from its former decision by it on the Edison original patent, that-

> "the prior art did not disclose the specific type of apparatus which is described in his patent. His apparatus is capable of using a single sensitized and flexible film of great length with a single lens camera, and of producing an indefinite number of negatives on such a film with a rapidity theretofore unknown."

and further said:

> "The meritorious feature of the device is that they seize hold of the film firmly, move it positively, regularly, evenly, and very rapidly, without jarring, jerking or slipping, producing a negative which can be printed from and reproduced as a whole without rearrangement to correct imperfect spacing of the successive pictures."

By such device operating in connection with the row of holes at the edges of the film, a negative was produced with sharply defined pictures; because of the positive motion of the film through a device entering the holes it could be

positively stopped so as to obtain sharply defined pictures; by reason of the regularity of the advance of the film these pictures were equidistant; as the camera had but a single lens these pictures showed successive positions of an object in motion as observed from a single point of view; they were arranged in continuous straight line sequence; they were sufficient in number on account of the capacity of the device advancing a long strip as much as several hundred or even thousands of feet to represent the movements of an object through an extended period of time. The positive motion pictures could be readily produced on a similar long film provided with perforations, and was shown and described in the original patent, which perforations enabled the moving picture to be projected in a projecting machine through devices in such machine advancing the film in a manner similar to its advancement by the device of the camera and with similar rapidity. Edison thus made practical what was before theoretical and impracticable, and was a pioneer in the moving picture art, the same as Bell in the art of telephony, and other great inventors in their respective arts.

Edison's invention of the camera and the motion pic-

ture film was considered of great importance and was described in the New York Herald, June 13, 1891, and in Harper's Weekly of the same date. His invention was thus generally known to the public shortly before he made his application for a patent for it. He did not, however, begin the manufacture of motion pictures as a business until about the year 1894.

It was but a short time, before Edison's original patent was infringed by a number of concerns, and he was compelled in order to protect his rights to bring twenty-three suits upon the original patent in various parts of the country for infringement between December 7, 1897 and September 16, 1901. Among the defendants in these suits were William N. Selig (afterward the Selig Polyscope Company), the American Vitagraph Company (controlled by the same interests as the present Vitagraph Company of America) S. Lubin, and the Biograph Company.

In some of these cases there were consent decrees; in some decrees pro confesso, and in others proceedings were held up pending the test case against the Biograph Company. This case was decided July 15, 1901, by Judge Wheeler in favor of Edison. The Court of Appeals, however, reversed his decree March 10, 1902, on the ground, in substance, that the claims were too broad in their scope.

The original patent was then reissued September

30, 1902, in two divisions, one No. 12037, covering the camera, and the other, No. 12,038, covering motion picture film.

Prior to 1908, six suits were brought by Edison under the camera reissue, one against the Selig Polyscope Company, another against the American Vitagraph Company, and another against the Biograph Company, the latter being again considered as a test case begun November 6, 1902, within five weeks after the grant of the reissue. This case was hotly contested, and was decided by Judge Ray in the Court below March 26, 1906, who held claims 1, 2 and 3 to be valid but not infringed, and claim 4 to be invalid. His decree was reversed on appeal, the Court holding claims 1, 2 and 3 to be valid and infringed by what was known as the Warwick type of camera. As these claims were construed by the Court of Appeals they covered practically every motion picture camera now in use commercially.

Suits were also brought under the Edison film reissue No. 12,038, against the Biograph Company; the Selig Polyscope Company and S. Lubin. Evidence was taken in the latter case by the plaintiff. It was discovered that the word "equidistant" had been inadvertently omitted from the claim, and a second reissue was obtained January 12, 1904, No. 12,192.

The fifth claim of the original patent, covering the motion picture film, was held void by the Court of Appeals. It was too broad, not being limited to the actual invention Edison made. The Edison reissue No. 12,192 for the motion pic-

ture film properly limited it to distinguish it from anything referred to by the Court of Appeals in such decision or the prior art to a motion picture film "provided with perforated edges" and also to such film having "uniform, sharply defined equidistant photographs" observed from a single point of view "at rapidly recurring intervals of time" and "sufficient in number to represent the movements of the object throughout an extended period of time." So limited, the claim was for an absolutely new moving picture film, for the only practical one that had ever been produced, and for one that has never been improved in any way since Edison invented it in 1889.

Between January 12, 1904, and November 16, 1907, when Edison assigned this reissue and also the camera reissue No. 12,037, to the Edison Manuf'g. Company, Edison brought seven suits under this reissue, some of the defendants being George Melies and Gaston Melies, the American Vitagraph Company, and the Compagnie Generale de Phonographes, Cinematographes et Appareils de Precision, and J. A. Berst, afterwards Pathe Freres, of which J. A. Berst was the vice president.

The fact that these suits on the film reissue were not pressed to final hearing prior to the assignment to the Edison Company, referred to by Mr. Grosvenor, is explained by the strenuous litigation Edison was engaged in in asserting

his rights under his original patent and the camera reissue in the two suits that went to the Court of Appeals. The last of these suits was not terminated until the decision of the Court of Appeals on the 5th day of March, 1907.

The expenses of these suits would have financially ruined any inventor who did not have the large resources of Edison, and it could hardly be expected that he would be able to prosecute simultaneously every infringement as it arose.

This last decision of the Court of Appeals clearly defined the invention Edison had made, which by the very definition included not only the camera, but the motion picture film that could be made from negatives produced by the camera, essential for practical use and which had never before been produced. Practically all of the manufacturers and importers of motion pictures who had infringed the Edison camera and film reissues believed, after this decision, that they were valid, because seven of them took licenses from the Edison Company under them, only one, the Biograph Company, declining at the time to do so. That their views were correct is shown by the fact that subsequently, in a suit against the Chicago Film Exchange, to which we will further refer, the film reissue was, after vigorous contest sustained.

After the strenuous litigation in which Edison had been engaged in endeavoring to protect his rights, extending

from December, 1897, when he filed his first suit, until the decision of the Court of Appeals March 4, 1907, and he had assigned his reissues to the Edison Company November 16, 1907, it became a matter for decision by that Company as to whether it should endeavor to control the motion picture business itself under such patents, or should grant licenses to others, reserving merely the right to manufacture and sell motion pictures itself, and it shortly afterward adopted the latter course.

On June 10, 1907, Pathe Freres was organized as a company of New Jersey and succeeded to the business in this country of the Compagnie Generale de Phonographes, Cinematographes et Appareils de Precision, which had been sued by Edison under his film reissue. Shortly after such organization, it purchased land and a factory and began the making of positive motion pictures at Bound Brook, New Jersey. At the time of its organization it had the intention of making in this country the negatives, from which to reproduce such positives, and since then it has established a large studio for this purpose and carries on an extensive business. Berst, who had been sued with the Compagnie Generale etc. by Edison under his film reissue, and who became vice president of Pathe Freres, was exceedingly anxious to be free from litigation under the Edison patents.

Early in 1908, after negotiations with the Edison

Company, he obtained a license for his company, the terms of which were the result of various discussions between representatives of the Edison Company and Pathe Freres, and were principally those which Pathe Freres insisted on. It had then, and still has, the largest business in motion pictures in this country.

Early in 1908, similar licenses were also granted to S. Lubin, Selig Polyscope Company, the Vitagraph Company of America, and George Melies, all of whom, as we have shown, together with the predecessors of Pathe Freres, had been sued by Edison under his patent before referred to, and, in addition, licenses were granted to the Kalem Company and the Essanay Company.

These licenses were alike, and each released the licensee from an account of profits and damages on account of infringements of these patents prior to the date of the licenses.

So far as the Edison reissues are concerned, therefore, all but one of the then manufacturers of motion pictures were released for infringements they had committed and were free to pursue their business without danger of being molested or stopped through the enforcement of such reissues against them.

Between the early part of 1908, and December of that year, the Edison Company, in pursuance of its covenant in each of these licenses to enforce its reissued patents, brought suit on the camera reissue No. 12,037, against the National Cameraphone Company in the Southern District of New York, and also brought forty-six suits on the Edison film reissue No. 12,192, one of the defendants being the Biograph Company, and another George Kleine.

Prior to December, 1908, nine suits had been brought by the Biograph Company under the Latham patent No. 707,934, dated August 26, 1902, one of the defendants being the Edison Company, another the Vitagraph Company of America, another the Kalem Company, another S. Lubin, another William N. Selig, and another the Essanay Company.

This patent covered inventions absolutely essential in all projecting machines and important also in motion picture cameras.

In projecting machines it is necessary to have devices that seize hold of the film and move it positively, regularly, evenly and very rapidly, without jarring, jerking or slipping, the periods of rest being greater than the periods of movement, as in the camera.

The only device that was found practicable for

doing this was the sprocket wheel, like that of the Edison reissue (or its equivalent), the teeth of which entered the holes in the edges of the motion picture film. If the device of the Edison reissue for advancing the film were employed, it would as it was organized, require the teeth to pull the film against the devices from which it was unrolled, and it was liable to be torn at the holes near the edges, particularly after being used in the projecting machine a number of times, as is customary, and the pictures would not be advanced with regularity or to proper position, which caused them to blurr when projected on the screen, where they appear increased in size as large as one hundred and fifty times that of the pictures on the film, thus exaggerating any slight difference in position to which the film was moved each time due to the more or less tearing of the film at the holes by the sprocket pins or equivalent devices.

The gist of the invention made by Latham consisted in providing a device for feeding the film regularly so that a loop or slack was formed before it reached the sprocket feeding device, and so that the latter had to act only against such slack film at the aperture where it was exposed, and there was no liability of the pins on the sprocket wheel tearing the film near the holes at the edges of the film.

This invention was also important in the moving picture camera, so as to insure the advancing of the film without liability of its being injured near the holes at its edges, and was, and is now, employed in all motion picture cameras.

The Latham patent had been granted after a long and expensive interference in the Patent Office conducted by Messrs. E. & H. T. Anthony & Company, the assignees of Latham. This company and its successors were without resources to enforce it against infringers. It carried on negotiations, however, with the Edison Company, and the Biograph Company, endeavoring to sell it to one or the other, which resulted in its purchase by the Biograph Company February 5th, 1906.

The Biograph Company also owned the Prosa patent, No. 722,382, dated March 10, 1903. This was also an important patent covering inventions in projecting machines which consisted in the interception of the light by a peculiar construction of shutter so as to avoid the flickering caused by the rapid succession of the different pictures of the moving object, and is now used in all practical projecting machines.

Prior to 1908 the great value of the Pross invention was not appreciated except by the Biograph Company. As soon as it learned that this patent had been infringed it brought three suits under it in May and July, 1908, the defendants in which afterward took licenses thereunder.

Mr. Grosvenor is in error in his statement in his report that this Pross patent has been declared invalid in a suit brought on it.

Prior to December, 1908, the Armat Moving Picture Company had brought ten suits under the Jenkins & Armat projecting machine patent No. 586,953, dated July 20, 1897. One of these suits, in which the defendant was the Biograph Company, was decided October 21, 1902, by Judge Hazel (118 F. R. 840) and a perpetual injunction granted. The Biograph Company then took a limited license permitting it to use, but not to sell, machines containing the invention. At this time it was using the motion picture film only in giving exhibitions.

Another of these suits was against the Edison Company, in which an order for injunction was granted by Judge Lacombe (121 F.R.589), and a motion to vacate the same was afterwards denied by him (121 F.R. 559). On appeal, however, this order was reversed because of doubt as to title, the Edi-

son Company, S. Lubin and another making claim to an interest in the patent. (125 F.R.,939). This suit was not vigorously proceeded with, owing to lack of funds of the Armat Company, but was being proceeded with to final hearing just prior to December, 1908.

The gist of the invention of this Jenkins & Armat patent consisted in devices in a projecting machine whereby the interval of illumination and exposure of successive pictures exceeded the interval consumed in changing them.

Prior to December, 1908, other suits were brought by the Armat Company under the Armat patent No. 673,992, dated May 14, 1901.

It will thus be seen that a manufacturer, in order to lawfully do business in the manufacture of motion pictures, had to obtain licenses under the Edison camera and film reissues , owned by the Edison Company, and also under the Latham patent, so far as it covered such cameras, owned by the Biograph Company, and the exhibitors using the motion picture film made by such manufacturer, or imported, had to obtain the right from Edison or the Edison Company to use the same under the Edison film reissue patent, and also the right to use the projecting machine for exhibiting it from the Biograph Company, under the Latham, Pross and other patents it owned, and also from the Armat Moving Picture Company, under the patents it owned.

Neither the business of manufacturing motion pictures, nor exhibiting them, therefore, could be safely conducted without such licenses.

To end the large number of vexatious and expensive litigations under these various patents, and to be able to grant these different licenses necessary to the lawful carrying on of the moving picture business, the Motion Picture Patents Company was formed.

It succeeded in obtaining title to the Edison camera and film reissues from the Edison Company, the Latham, Press and other patents, from the Biograph Company, and the Jenkins & Armat patent, and some other patents, from the Armat Company, and some other patents of minor importance, owned by the Vitagraph Company of America. In order to obtain the three sets of patents, it had to arrange for the obtaining of three classes of royalties, one on the motion picture film, under the Edison film reissue, another for the use of projecting machines using motion picture film, under the projecting machine patents, and another from manufacturers of such projecting machines, under such patents.

The motion picture film royalties were to be one-half cent a running foot, with a slight rebate for quantity above a certain amount.

The royalties from manufacturers of projecting

machines were to be not over $5. a machine, and the royalties from exhibitors were to be $2. a week.

From the gross royalties of the exhibitors, 14% was to be set aside and distributed among the licensed manufacturers and importers of motion pictures, except to the Edison and the Biograph Companies, hereafter referred to. From the royalties from manufacturers of projecting machines, the Vitagraph Company was to be paid $1. for each machine containing the inventions of any of its patents, on one class of machines, and three-fifths of one percent of the retail price of such machines, on another class.

From the film royalties, and the rest of the machine and exhibitors' royalties, certain expenses were to be deducted and then these royalties were to be divided as follows:-

The Edison Company was to receive an amount equal to the net film royalties. If there were any royalties above this, and up to an amount equal to the net film royalties they were to be divided, two-thirds to the Biograph Company and one-third to the Armat Company. Any further royalties above these amounts were to be divided, one-half to the Edison Company; one-third to the Biograph Company, and one-sixth to the Armat Company.

After succeeding in these negotiations, and ob-

taining these patents on such onerous terms, on December 10, 1908, the Motion Picture Patents Company granted licenses (modified by agreements of January 25, 1909) to the Edison Company and to Pathe Freres, B. Lubin; Selig Polyscope Company; George Kleine; The Kalem Company; The Essanay Company, and the Vitagraph Company, all of whom had been licensees of the Edison Company, and to the Biograph Company and George Kleine, an importer of motion picture film, and released them all from all claims for profits and damages on account of the infringement of any of the patents before referred to.

All of the pending suits before referred to were at once discontinued because some of the defendants had become the licensees before referred to of the Patents Company; because others had either discontinued business, or, where they were exchanges or exhibitors, because they took exchange or exhibitors' licenses.

In Bement v. National Harrow Company, 186 U.S., 70 (at page 93) the Supreme Court said:

> "There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. The execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents, as found by the referee. This was a legitimate and desirable result in itself."

In the case of Indiana Manufacturing Company vs. J. I. Case Threshing Machine Company, 154 F. R., 365, the plaintiff owned certain pioneer patents for pneumatic straw stackers, and as the Court of Appeals said:

> "As patents for improvements were issued from time to time appellant bought them up, in the main, until now it owns practically all of the patents that pertain to this art."

At the time of the suit, the plaintiff was not building stackers for the trade. Its business was in granting licenses and obtaining royalties thereunder.

It was contended by the defendant that in view of the large number of licenses, and the fact that the plaintiff had a large number of patents, all the makers of threshing machinery having come into the system, this was violative of the Sherman Act. The Court said:

> "The Public could not force it (the plaintiff) to license another to make its device. If it had stopped with the first license to Gaar, Scott & Co., appellee apparently concedes that the Sherman law would not have been violated. x x x x The contracts and the businesses of these licensees are separate. But if, as a condition of enjoying the inventions, appellant had required the licensees to form a pool or combination for controlling the price and output of the patented article, the public would not have been injured, and consequently the Sherman law would not have been violated. Rubber Tire Wheel Co. vs. Milwaukee Rubber Works Co., 154 Fed. 358."

So far it is clear that the action of the Patents

Company in making its various arrangements and obtaining title to the various patents cannot be considered as a violation in any way of the Sherman Act.

We will now consider first the manufacturers and importers licenses, and, incidentally, the agreements between the Eastman Kodak Company and the Patents Company, concerning the furnishing of the raw film used for making motion pictures.

THE MANUFACTURERS' LICENSES AND THE EASTMAN KODAK COMPANY AGREEMENTS.

The licenses granted by the Patents Company to the nine manufacturers and one importer are substantially alike in their provisions.

The Patents Company, owning the basic patents covering projecting machines, had the right under the Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co. case, (77 Fed. Rep., 288) and many other cases following that, affirmed in the case of Henry vs. Dick, decided March 11, 1912, to restrict the use of machines containing the inventions of such patents to articles adapted for use in them procured from either the Patents Company or those authorized by such Company to furnish such articles.

The Motion Picture Patents Company was not a manufacturer of these articles, namely, motion pictures, and there-

fore granted to those who made and imported them, which it clearly had the right to do, the right to furnish the same for use in the projecting machines made and operated under its patents.

It is to be borne in mind that the article (motion pictures) which they were given the right to furnish, are unlike, in important particulars, articles of common use. The production of motion pictures is an expensive business, which requires peculiar judgment, if not talent, in furnishing those that will be attractive to the general public when seen. If each of the manufacturers and importers should make precisely the same motion picture and show it, the demand therefor would be extremely limited. It was necessary that there should be active competition between the different manufacturers and importers in order to produce different subjects, with all efforts directed toward each subject attracting popular interest.

To increase the competition between the licensees in the production of the most attractive subjects, the Patents Company was willing to divide up some of its royalties among them, each licensee getting such proportion of its royalties set aside as its production of motion pictures bore to the production of all the licensees. The more motion pictures pro-

duced, and disposed of, the more money there would be received by the Patents Company as license fees. The Patents Company had the right to fix a minimum price at which the licensees could dispose of the motion pictures in order that they would be compelled to get a price which experience had shown would enable them to make a profit.

It would not do to permit the licensees to sell outright their motion pictures, because experience had shown that they should have control of them in case they were used in violation of regulations necessary to give the best exhibitions to the public and prevent injury to them and the Patents Company.

To obtain, mechanically, the best pictures, it was necessary that the best raw film should be used, and it was therefore proper for the Patents Company, which did not make such film, to require the licensees to obtain such raw film from some manufacturer to be selected by it.

A reference to the license and modification thereof which made clearer certain of the provisions, shows the conditions under which motion pictures were disposed of by the licensees, all of which were necessary to the protection of the licensee, the Patents Company and the public.

These conditions have always been printed on the boxes containing the motion pictures leased by the licensees:

That the motion picture is leased by and is the

property of the licensee; and that the lessee shall not dispose of the same outright by sale or otherwise, having only the right to sublet or use the same.

These statements of ownership and condition of leasing by the licensees were fair, in order to permit the licensee to replevin the motion picture in the event of its unauthorized or other injurious use.

That the lessee shall permit such motion picture to be exhibited only on motion picture projecting machines licensed by the Patents Company under its patents covering the same; and that the lessee should not have the right to sublet such motion picture until the lessee has entered into an agreement in writing with the Patents Company containing terms and conditions prescribed by it, and only while the lessee complies with the same and while it remains in force.

This looked toward what is known as the exchange license, to which we will refer later.

There were two other conditions, one providing against what is known as "duping" which prevents the making of unauthorized and counterfeit motion pictures; the other, that the trade mark or title should not be removed, the violation of any of the foregoing conditions entitling the licensee to immediate possession of the motion picture.

the same under its patents.

They were, however, compelled to place on such machines a plate having on it a serial number, the dates of the patents under which it was licensed, and the following:

> "The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of reissued patent number 12,192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine."

The only terms fixed by the Patents Company which have ever been exacted has been the payment to it of $2. a week for the use of each exhibiting machine covered by its patents.

At the time the licenses were granted, neither the Armat Company nor the Biograph Company nor the assignor to it of the Lathan patent, had manufactured or sold any projecting machines or authorized anyone else to do so, containing the inventions of the various patents referred to. A large number of projecting machines were, however, in use, which had been made in infringement of these projecting machine patents before they were acquired by the Patents Company. These were also permitted to be used by the Patents Company solely with motion pictures which it authorized its licensees to lease, and on

payment of $2. a week therefor. The moving pictures with which the projecting machines could be used were designated as moving pictures containing the invention of reissue patent No. 12,192, merely as a short way of describing and identifying such article, a full description being found in the claims of the Edison film reissue.

The 4th paragraph of the license required the licensees to use exclusively raw film procured from a manufacturer or manufacturers who, by an agreement with the Patents Company, was or were to collect and pay to it the royalties on the raw film furnished the licensee.

The Eastman Kodak Company was selected, and an agreement made between it and the Patents Company early in 1909, which was terminable on sixty days' notice by either party, whereby the Eastman Company was to furnish raw film of a standard width such as the manufacturers used, and to no one else in the United States, except to persons for practically scientific use, and except to concerns not licensees which had an established business of making motion pictures in foreign countries, and who, at the time of the agreement, made the same in the United States, or who might after that time commence to make the same there.

It had a patent covering the raw film, and it also

made the same by secret processes and such film contained secret formulae. It had a lawful right to make an exclusive agreement to sell its entire output to the Patents Company's licensees if it saw fit. There was other raw film on the market suitable for making negative and positive motion pictures. The making of this agreement, therefore, cannot possibly be considered as in any way looking toward giving the Patents Company a monopoly.

This agreement was afterwards changed on February 14, 1911, whereby the Eastman Company was free to sell its raw film to anyone.

The Eastman Company does not charge a higher price to purchasers other than the licensees for its raw film. The price it charges to the licensees is 3-1/2 cents a running foot for the kind of film they get, which includes the royalty of one-half a cent a foot (subject to a slight rebate in quantities above a certain amount) payable to the Patents Company, and which it turns over to the Patents Company. The prices at which persons other than the licensees get this raw film, outside of certain persons that are excepted in the agreement with the Patents Company, is 3-1/2 cents a foot, thus practically making the price to those persons who do not pay a royalty to the Patents Company the same as those who do. The Eastman Com-

pany, however, does not get this one-half cent equivalent to the royalty, but only gets a part of it, the rest going to the person who handles the business of distributing this raw film for his trouble in doing so, and for being responsible for the payments for the same.

We make this explanation in view of Mr. Grosvenor's statement about the Eastman Company charging a higher price to purchasers other than the licensees.

The change in the agreement was not made for one of the reasons suggested by Mr. Grosvenor, viz., because the Department was investigating its business methods at the time, because the Eastman Company had no knowledge of any such investigation at the time of the change. It was, however, changed for the other reason he suggests, viz., that the demand of the independents for film promised such a large source of profit that it would have been unbusiness-like to refuse to sell it to other persons who desired it in their business.

The very fact that it wanted to and did modify this agreement, in order to supply such large demand by the independents, shows that the Patents Company and those with whom it has agreements have far from any monopoly of the moving picture business, although they lawfully have a right to such monopoly under its patents.

For completeness we would say, concerning the agreement of June, 1909, between the Eastman Company and the Patents Company concerning non-inflammable film, that although it had, at enormous expense, succeeded in producing a practical non-inflammable film for motion pictures, which no one else had ever been able to produce, and had for a time supplied the same to the licensees, they found that there was no real public demand for it, that as it cost them slightly more than the nitrate film they ceased using it, leaving on the hands of the Eastman Company a large amount of unused material, costing it a number of hundred thousand dollars, for which there is no present or prospective demand.

The very nature of the business of the licensees required active competition between them, since what they make out of it depends upon their success in producing motion pictures that are, as far as they can make them, more successful and more popular with the public than those of any other licensee.

The greater the number of feet of motion picture film they make, the greater the profit from

1. The profit on the price obtained from leasing the pictures;

2. The rebate obtained on film royalties as the num-

ber of running feet of such picture film is above a certain amount; and

3. The share of the division of the 24% of the gross exhibitors' royalties dependent on the proportion of each licensee's output to the output of all the licensees.

Although under paragraph 18 of the manufacturers license the licensee could lease directly to exhibitors for use in projecting machines licensed by the Patents Company, it turned out from previous experience that it was not practicable to do this, since each exhibitor would have to get its supply from the various licensees, and as motion pictures of particular subjects are only exhibited in any one exhibiting place for a few days, the cost of procuring the large stock of them that was necessary, was prohibitive. What were known as exchanges therefore came into being, which leased a large stock of motion pictures from the various licensees and were thus able to sub-lease motion pictures to different exhibitors and for various times, thus keeping them in circulation.

The Patents Company granted to a number of persons who had organized such exchanges the right -

> "to lease licensed motion pictures from the licensed manufacturers and importers and to sub-lease said licensed motion pictures for use only on projecting machines licensed by the licensor under letters patent owned by it."

and subject to certain other conditions enumerated fully in the agreement.

Some of these conditions were amplifications of those printed on each box containing motion pictures which the Patents Company's licensees were given the right to furnish for use only in projecting machines operated under its patents covering the same, and others were to prevent, in various ways, abuses which experience had shown were liable to occur when motion pictures were sublet by exchanges, and also to fix the terms on which such exchanges could obtain motion pictures from the Patents Company's licensees and the times when they should be returned after use.

The exchange agreement was terminable by the Patents Company on fourteen days written notice, but althoughit had this right, it never exercised it, except for cause. This right of termination on such notice was upheld by the Supreme Court of the State of New York and the Appellate Division in the case of the Greater New York Film Company vs. Motion Picture Patents Company, recently decided.

LEGALITY OF THE MOTION PICTURE PATENTS COMPANY, ITS MANUFACTURERS AND IMPORTERS AND EXCHANGE LICENSES.

So far, there can be no doubt as to the legality of the Motion Picture Patents Company, the licenses it has

granted to manufacturers and importers of motion pictures, its agreements with the Eastman Company, and its exchange license agreements.

Such legality rests primarily upon its ownership of patents covering the projecting machines, and its right to limit the use of such machines under its patentscovering the same, with the article, namely, motion pictures,which it authorizes the persons who produce the same to supply for such use. We need not refer again to the law making this method of obtaining revenue from patents lawful and in no way violative of the Sherman Act, but call attention to a full discussion of the matter in the Yale Law Journal, Volume 21, No. 6, April, 1912, page 433, in addition to our reference to the decisions heretofore made.

Under paragraph 21 of the licenses to the manufacturers and importers, each licensee could continue the agreement up to August 26, 1919, the date of the expiration of the Latham patent, No. 707,934.

The intention, therefore, was clearly that the

agreements should not continue longer than the life of this Latham patent, - a foundation one covering all practical projecting machines, - notwithstanding the Patents Company owned other patents for inventions in such machines which ran for a considerably longer term of years.

This shows that the patents were not merely used as a cloak for carrying out a restrictive scheme, because when the main patent covering projecting machines expired, whatever lawful monopoly the Patents Company was able to maintain also ended.

EDISON CAMERA AND FILM REISSUES.

If any further ground is necessary for showing the legality of the Patents Company and its various agreements made, so far considered, it is found in the Edison camera and film reissues, covering, respectively, the only form of camera device now in use by anybody, and the positive motion-picture film, which is the only motion picture film that ever has been or is now in practical use capable of being projected in projecting machines so as to be usable and in any sense popular.

The Patents Company had a right to place a conditionon the use of cameras containing the inventions of the Edison camera reissue, and as to the prices and the manner in which the positive motion pictures produced from the negatives made in such cameras covered by the Edison film reissue should be disposed of, and used. This right only ran, however, until the expiration of the term of the original patent on which these reissues were granted, namely, August 31, 1914, and clause 7 of paragraph 4 of the manufacturers and importers licenses expressly provides that no royalty shall be charged to the licensees or paid by them after August 31, 1914.

The first clause of paragraph 19 of each of these licenses provides for the institution of suits by the Patents Company at its own expense against all infringers of the patents under which the license was granted, including, of course, these Edison camera and film reissues.

In accordance with this paragraph, the Patents Company has brought a large number of suits under various of its patents.

As we have before shown, the Court of Appeals had sustained the first three claims of the Edison camera reissue and held void the fourth claim, March 11, 1907, and every

one supposed that the long and tedious litigation concerning this patent was at an end. In one of the many suits which were subsequently brought, and in which injunctions were granted against infringers, it was contended by the defendants that there was unreasonable delay in disclaiming the fourth claim, which had been held void, and that the Patents Company could not, therefore, prevail. This view was rejected by Judge Lacombe, but the Court of Appeals expressed a doubt on the subject and reversed, for this reason, his order of injunction. As the reissue had so short a time to run, it was not deemed wise to contest the matter by showing that the delay in filing the disclaimer was not unreasonable, in view of the fact that there was a chance of the validity of the fourth claim being decided by the Supreme Court of the United States in certiorari proceedings, when the proper occasion arose, and to avoid the necessary delay of final hearing, and it was concluded to reissue the Edison camera reissue, striking out this fourth claim. This was done shortly after this decision of the Court of Appeals, the new reissue being numbered 13,329. The reissue section clearly gave the right to surrender the patent and to strike out the fourth claim, if invalid, the only penalty being that all suits on the reissue patent so reissued should come to an end, and there could be no recoveries under them. A new suit

was at once begun on the last reissue, which suit is now pending.

Mr. Grosvenor refers to the Patents Company having to pay $150. for prosecuting one of the cases on the camera reissue that had been surrendered while efforts were being made to obtain the reissue numbered 13,329. It was clearly within the rights of the Patents Company to carry on this suit, because the reissue might not have been granted, or the Patents Company might have concluded to go to final hearing under the one that was surrendered, abandoning the application for the new reissue.

There is no question that the first three claims of this reissue, which are the same as in the one surrendered, cover an original, meritorious and exceedingly valuable invention.

If the Patents Company cannot eventually succeed in preventing the pirating of this valuable invention and enforcing the monopoly which the law intended to give, it will be purely on the ground of a narrow technicality, which no court of equity has heretofore sustained, and which should not appeal to any court of equity.

Concerning the Edison film reissue, we would say that Mr. Grosvenor's suggestion that it was considered by Edison and

the Edison Company as of no value after the final decision of the Court of Appeals concerning the original Edison patent, to which we have referred, is negatived by the various suits brought by Edison and the Edison Company upon this reissue to enforce it, and by the fact that early in 1908, seven (having then all but one of the then motion picture manufacturers took licenses thereunder, and that in December 1908, when the Patents Company obtained title to this reissue, these seven, and two others, the most important then of the motion picture manufacturers and importers, again took licenses under it.

Mr. Grosvenor is in error in stating that not one of the suits which were started on the fifth reissue in November, 1904, was ever pressed, and that the only one of these suits in which testimony was taken, - that against E. Schneider, - and the taking of proofs closed July 5, 1905, was never pressed to final hearing. The law is clear that a patentee does not need to press all suits for infringement to hearing, but can select one to press and let the others abide the event of that. In one of these suits, - that against George and Gaston Melies, - which he refers to, issue was joined and a decree was taken pro confesso May 10, 1905. In two others of these suits, one

against Paley & Steiner, and another against the Compagnie Generale de Phonographes, Cinematographes et Appareils de Precision and J. A. Berst, treasurer of Pathe Freres, there was an oral agreement between counsel to permit the case against Schneider to be considered a test case.

In the case against Schneider, after the plaintiffs proofs were closed July 3, 1905, there was a stipulation February 6, 1906, as to testimony that might be taken from the suit against the American Mutoscope Company case. About this time Schneider discontinued active business, and, therefore, the further prosecution of this suit would have been of no particular value.

Edison was devoting his energies and resources to the prosecution of the test case, on the Camera reissue against the Biograph Company, and necessarily desired to await the outcome of this suit before incurring further large expense in prosecuting the other suits on the film reissue.

Mr. Grosvenor states in his report that in his opinion this reissue is of no value, owing to the decision of the Court of Appeals in the first case on the Edison original patent to which we have referred, and that it is principally upon what he considers this "worthless" patent

not covering, in his opinion, a positive motion picture film, but only negative motion picture film, that what he calls the "combination" has been founded. He is in error as to these opinions. In the first place, we have shown that the different agreements are not based principally upon this Edison film reissue, but upon the lawful rights of the Patents Company under its patents covering projecting machines, and, secondly, this Edison film reissue is not a worthless patent. We have heretofore pointed out, what the Court of Appeals, in the second decision upon the Edison camera reissue held to be the invention covered by the claims, and that necessarily, the positive motion picture reproduced from the negative made by such invention had peculiarities and characteristics which were absolutely new with Edison, and were not found in the prior art anywhere. In the next place, the Edison film reissue claims a positive motion picture film, and not merely a negative motion picture film, as he supposes.

A suit was brought by the Patents Company against the Chicago Film Exchange in the Supreme Court of the District of Columbia, in which a large amount of evidence was taken, and able counsel were employed for the plaintiff and the defendant, Judge Wallace being one of the latter, and the film

reissue was sustained by Judge Stafford December 21, 1911, and the defendant held to infringe.

The film reissue patent is addressed to those skilled in the art. It starts out by describing that the object is to produce pictures "representing objects in motion throughout an extended period of time, which may be utilized to exhibit the scene including such moving objects in a perfect and natural manner by means of a suitable exhibiting apparatus", and in this contested case there was the evidence of a competent expert that there was shown and described in this film reissue a positive motion picture. This evidence is quoted on pages 78 to 80, in the brief of the counsel for the plaintiff, where this expert testifies that the reissue shows and describes a positive motion picture such as is used in reproducing the effect of moving objects. In addition, the motion picture film which it was charged infringed this reissue patent was a positive one, as testified to by this expert, and not denied. The court could not have decided the case in favor of the plaintiff and have ordered an injunction against the infringement of this film reissue, which it did, unless the second claim of that reissue in controversy covered a positive motion picture film.

The legality of the various agreements up to August 26, 1919, is, therefore, reinforced, (if such reinforce-

ment is needed, which we deny) up to August 24, 1914, by reason of the Edison camera and film patents.

THE GENERAL FILM COMPANY.

This Company was formed April 21, 1910.

The system of exchange licenses had then been in existence about a year and four months. Many abuses and inconveniences had arisen injurious to the exhibitors, to the public, and to the licensees manufacturing or importing motion pictures.

The following are some of these:

The licensed exchanges frequently became interested in theatres or other exhibition places, either through ownership or by an interest in the box-office receipts. The result was they would very often favor their own theatres to the detriment of others, supplying the best pictures to their own theatres first. This worked a serious hardship to the outside exhibitors and minimized the business. This practice became so universal that there were few exchanges that had not pet theatres which they favored. In addition, exchanges sometimes sought to secure the custom of exhibitors and did so secure it by threatening that if they did not take service from them they would open competing theatres near such exhibitors and drive them out of business.

Motion pictures are issued or "released" simultaneously all over the country on certain days called "release" days. The market value of motion picture service depends almost entirely upon the age of the motion pictures, counting from the release date. The prices for such service are fixed largely on that basis. The licensed exchanges made contracts with the exhibitors for service at a certain date, and then rarely carried out the same. This practice became so universal that an exhibitor could not get any relief by shifting to another exchange. The situation became intolerable to the exhibitors, and the Patents Company and the licensed manufacturers insisted that the exchanges be forced to observe their contracts. The Patents Company and the licensed manufacturers and importers were powerless to control the acts of the exchanges and could grant no relief, save in some instances by cancelling the exchange licenses of those running exchanges who were flagrant wrong doers.

Licensed exchanges frequently supplied exhibitors with motion pictures that were so worn and scratched as to be unsuitable for public exhibition, to the great discomfort and disappointment of the public and loss to the exhibitors. It became a common practice with the exchanges to bribe the

operators of exhibitors, who accepted inferior motion pictures and those that were not in perfect condition, or too old to be used, and the operators of the exhibitors would report to them that such exchanges were supplying motion pictures that were unsatisfactory and such as they paid for. Motion picture exhibitions were thus brought into disrepute, with loss to all engaged in the business.

Where several competing theatres operated in a town or section of a city, it is important for profit to the theatres and convenience to the public that several theatres show different programs of pictures. A number of such exchanges serving competing theatres were likely to supply similar programs to them, since the better class of theatres always used the most recent motion pictures available, and each exhibitor solicited the exchange with which he dealt to furnish him the latest issue of the most popular moving picture. Each exchange, in order to please its customers and attract others would strive to meet this demand, the result being that it was a common thing to find a number of theatres within a few blocks, or in one block, showing identically the same pictures on the same day, while other pictures of equal or superior interest were not shown at all in that neighborhood. Thus the public, instead of going from one show to another to see a diversified set of pictures, were deprived of the opportunity of seeing.

many pictures, and the business of all the exhibitors suffered.

Again, an exhibitor was never able to learn from his exchange the names of the motion pictures that he was to receive day by day, and he was thus unable to advertise his program in advance, and could not let the public know what they might expect to see, nor could he give the public any advance information as to the time and place where any particular motion picture could be seen. This condition seriously inconvenienced the public and injured the business of the manufacturers and importers of motion pictures, who might spend thousands of dollars in securing an exclusive and valuable motion picture and could not let the public know where and when it should go to see it. The unsystematic methods of exchanges made it impossible for them to notify exhibitors of the programs in advance and frequently the exchanges would transfer a "hit" picture intended for one exhibitor to another exhibitor at the last moment, for the sake of competing unfairly with the customer of another exchange.

As we have before pointed out, there were a large number of projecting machines infringing theprojecting machine patents which the Patents Company acquired at the time it began business. It first undertook to give a written license under such patents to the users of such machines, but found

this cumbersome and difficult to do. It also found it impracticable to compel the users of such projecting machines to put a plate on them such as those who had licenses to manufacture such machines were compelled to put on, such plate restricting such machines for use only with motion pictures procured from licensed manufacturers and importers. It therefore ceased issuing written licenses, and it arranged with the owners of the licensed exchanges to collect the royalty of $2. a week for the use of each exhibiting machine covered by its patents. It was found that many of the persons having licensed exchanges repeatedly leased motion pictures procured from the licensed manufacturers and importers to exhibitors using machines which were not licensed under the Patents Company's projecting machine patents, from which exhibitors the persons running such exchanges did not collect the royalty due for the use of such machines.

It was very difficult to detect this fraud, and its constant commission deprived the Patents Company of the royalties to which it was entitled for the use of such exhibiting machines.

Three-fourths of all the exchange licenses that were cancelled were so cancelled on account of the commission of these and many other frauds and violations thereof.

The Patents Company during this period of time never refused a license to any exchange having a good business reputation. Many persons who obtained exchange licenses did not have capital enough to lease the number of motion pictures required to properly supply exhibitors in their particular locality, thus resulting in inferior exhibitions to the public and who were frequently unable to pay for the motion pictures they had leased, resulting in losses to the licensed manufacturers and importers.

The Patents Company had threatened to cancel licenses to persons operating exchanges in more than one locality, because of information that they had made agreements between themselves to maintain prices and restrain customers from each other, caused by the competition between such exchanges having at times been so keen that many lost large sums of money and became practically bankrupt.

To correct all these abuses and inconveniences to the exhibitors and to the public; to insure the payment of the large prices for motion pictures leased by the Motion picture manufacturers; to also enable exhibitors to exhibit in remote parts of the country where there was not enough business to make it profitable for the ordinary licensed exchange, and to further stimulate the manufacturers and importers to

produce the most attractive and popular subjects for motion pictures in competition with each other, it became necessary to change the system and this was done by the formation of the General Film Company, with its different branches, to which we shall now refer.

The Patents Company granted the General Film Company an exchange license on precisely the same terms and conditions as it had granted the exchange licenses we have referred to.

It also gave the General Film Company a limited license (in which this exchange license is omitted) to have manufactured for it by the licensed manufacturers motion pictures containing the inventions of the Edison film reissue, produced from negatives procured by the General Film Company in foreign countries from others than such licensed manufacturers and importers, and also to purchase motion pictures made in foreign countries. Those motion pictures which it either imported or had made from negatives made in foreign countries, it was given the right to supply to motion picture exhibitors for use only in projecting machines licensed by the Patents

Company under its projecting machine patents, and could not use them for giving exhibitions for profit, directly or indirectly.

It was to pay until August 31, 1914, the expiration of the Edison reissues, the same royalties to the Patents Company on motion pictures so made for and imported by it as the other licensed manufacturers and importers paid.

Under this license to import motion pictures, and to have them made from imported negatives by the licensed manufacturers, it was enabled to add an additional supply of subjects which the licensed manufacturers did not supply themselves, thus increasing the variety of motionpictures that could be furnished to exhibitors to this extent.

The leasing of such motionpictures which it had imported or had made from imported negatives could only be upon the same terms and conditions as those imposed upon the licensed manufacturers and importers.

The General Film Company thus became a limited licensed importer and producer of motion pictures, and in addition became a licensed exchange under the usual license exchange agreements.

It was thus in a position to lease motion pictures which it imported or had made for it from imported negatives, and under the exchange licenses, to lease from the licensed manufacturers and importers and to sub-lease them to exhibitors upon precisely the same terms and conditions as the persons having exchange licenses in turn sub-leased motion pictures, leased to them by the licensed manufacturers and importers.

To insure a supply of motion pictures from such licensed manufacturers and importers, it made an agreement with each of them on April 21, 1910, whereby each was obligated to supply it with as many copies of motion pictures as it required for the conduct of its business, at the same leasing prices and upon the same terms and conditions as such licensed manufacturer or importer leased such motion pictures to others, without discriminating against it in favor of such others in filling orders or terms of payment, or in any other way which would give to such others an advantage over it.

Each of the licensed manufacturers or importers was obligated to furnish the General Film Company with all the motion pictures produced by any one of them, and nowhere in the agreements is there any prohibition against any such

licensed manufacturer or importer leasing such motion pictures to anyone under the terms of its agreements with the Patents Company.

At the time these agreements were made with the General Film Company, the licensed manufacturers and importers were in active competition and were producing and leasing different numbers of new subjects during different periods of time. To insure, however, that the General Film Company should have at least one sample of each new subject to introduce, each manufacturer and importer obligated it to furnish one sample at various periods of time, depending upon the output. Thus it had to take from the Pathe Freres one reel every consecutive week; from the Biograph Company, the Edison Company, the Essanay Company, the Selig Company, the Lubin Company, and the Vitagraph Company, one reel every two consecutive weeks; from Gaumont, one reel every four consecutive weeks, and from Kleine one reel every ten consecutive weeks, made by Gaumont, of Paris, and one every four consecutive weeks, made by the Urban-Eclipse Company of England, - for sixty-two customers or the major fractions thereof, that the General Film Company served during any such time, respectively, from any place of business operated by it for the purpose of leasing and subleasing such

pictures to exhibitors. It was not, however, required to lease more than eighty reels of such motion picture film in any such respective periods of time.

The licensed manufacturers and importers, being in active competition, had always been suspicious of each other and of the Patents Company, and were also suspicious of the General Film Company, and they were not willing to and did not agree to lease their entire output of new motion pictures to the General Film Company. They reserved the right to lease them directly to exhibitors or to others having exchange licenses for sub-leasing them to exhibitors.

On the other hand, the General Film Company contemplated that it might possibly get a certain amount of business which might exceed the maximum number of reels (eighty) which it was required to take, yet at the time it would not obligate itself to take more than the eighty. As a matter of fact, it now takes more than eighty reels from a number of manufacturers.

It was supposed at the time of these agreements that the number of licensed exchanges would have to be reduced, and that a fewer number of reels would be required of any given subject from each manufacturer and importer than before.

This turned out to be the fact, and the licensed

manufacturers and importers lost, during the first year of the operation of the General Film Company, a million dollars in their revenue, due to the management of the General Film Company which could decrease the number of reels of new subjects and yet more adequately supply the exhibitors than the licensed exchanges had been able to supply with a larger number.

Apprehending this loss, and believing the abuses of, and the loss incident from, the old license exchange system and the inconveniences from it would be overcome by a more scientific management, they were willing to take the chances of such loss. They, however, desired something, if such loss did occur, to recompense them for it. The directors of the Film Company who were connected with the manufacturers, as we show hereafter, believed it would be a great inducement to such manufacturers and importers, to very active competition in the production of better and more popular subjects in motion pictures than before, if a certain share of the net profits of the Film Company was divided up between them in the proportion that the number of running feet to the motion pictures leased to the General Film Company by any one of them bore to the total amount of running feet of all motion pictures leased to the General Film Company by

all of them during any particular year.

The agreements between the licensed manufacturers and importers and the General Film Company, therefore, provided that, after deducting dividends of seven percent per annum on the issue of its preferred stock, and twelve percent on its common stock, and all operating expenses connected with the business, from the gross income, the balance remaining should be divided in the manner referred to between the licensed manufacturers and importers, in the proportion referred to.

It was further provided in these agreements that they should only continue, unless previously terminated for reasons provided, until August 26, 1919, the date of the expiration of the Latham patent No. 707,394.

The Directors of the General Film Company were Frank L. Dyer, then vice-President but now president of the Edison Company; J. A. Berst, vice president of Pathe Freres; S. Lubin, president of the Lubin Company; Gaston Melies, attorney in fact for George Melies; Albert Smith, president of the Vitagraph Company; Samuel Long, president of the Kalem Company; J. J. Kennedy, president of the Biograph Company; W. N. Selig, president of the Selig Polyscope Company; George K. Spoor, president of the Essanay Company;

and George Kleine. The president was J. J. Kennedy, vice-president George Kleine, treasurer was Samuel Long, and secretary William Pelzer.

Each director who represented his respective concern which was a licensed manufacturer or importer was the owner of only one-hundred shares of the common stock of the General Film Company, for which he paid cash. This was only a fair and reasonable precaution so that each could be sure, as their concerns were always in active competition and suspicious of each other, that no advantage would be taken of any one of them in the distribution of the motion pictures beyond the one reel for each sixty-two customers, or a major fraction thereof, for each place operated by such company during the times it took one reel of each new subject.

To further protect the licensed manufacturers and importers, Section 2 of Article 9, of the By-Laws of the General Film Company provided that,

> "all motion pictures that the company requires at each place of business that it operates in conducting that part of its business which consists in the licensing of motion pictures from the manufacturers and importers thereof, and the sub-leasing of motion pictures to exhibitors of motion pictures shall be selected by the representatives of the company in charge of such places of business. The representative in charge of each such place of business that the company operates shall order directly from the manufacturers and importers of motion pictures whose motion pictures the representatives of the company are

> authorized by the company to obtain and sublease, as many copies of any or all of the motion pictures of such manufacturers and importers as each representative deems best in the interest of the company, in conducting its business at the place at which he had charge."

The General Film Company did not engage in the exchange business until June 6, 1910, on which date it commenced to operate three motion picture exchanges, one in New York City, one in Chicago, and one in Philadelphia, it having acquired on May 26 and May 27, 1910, the property of these exchanges.

Thereafter, during the month of June, 1910, it acquired the property of seven other exchanges; in July, 1910, of five; in August, 1910, of five; in September, 1910, of six; in October, 1910, of thirteen; in November, 1910, of two; in December, 1910, of five; in January, 1911, of one; in February, 1911, of one; in March, 1911, of one; in April, 1911, of one; in May, 1911, of one; in June, 1911, of two; in August, 1911, of three; in November, 1911, of one.

In this way it gradually, during this period of time, became the possessor of the property of fifty-seven exchanges.

The property thus purchased from each exchange consisted of merchandise on hand of various kinds, such as its

unexpired right to use the stock of motion pictures on hand, the furniture, fixtures, stock of licensed projecting machines, and supplies therefor, and other articles incident to the business.

The General Film Company never bought the business or the good will thereof of any such exchanges, nor has it ever made any agreement with any persons connected with any exchange whose property it bought, restraining them from doing an exchange or any other business; and the exchange licenses of these fifty-seven exchanges were never acquired by the General Film Company and could not be, as they were not assignable, and they have never been cancelled.

The Patents Company never intimated in any way to any of the persons operating exchanges from whom the General Film Company purchased the property referred to, that the exchange licenses would be or might be cancelled, or caused them to fear that unless they sold such property to the General Film Company their licenses would be cancelled.

In every case the persons from whom such property was purchased were either disgusted with the business, or feared it would not be permanent and that they might lose their investment, and expressed themselves entirely satisfied

with the price paid for their property by the General Film Company.

The General Film Company employed such of the persons who owned such film exchanges, and their employees who were willing to accept employment, as it thought desirable for its business, and many of them are now in its employ.

A number of the licensed exchanges voluntarily terminated their licenses with the Patents Company and are in business to-day, and, according to advertisements, their owners are doing a large and profitable business.

For a long time before the organization of the General Film Company owners of exchanges and exhibitors complained of unfair competition and dishonest methods, and many times requested the Motion Picture Patents Company to devise some means for correcting these evils. In each instance the Motion Picture Patents Company declined to interfere, and did not interfere, except to cancel licenses in cases where exchanges or exhibitors deliberately and flagrantly violated their licenses, or were guilty of such dishonest and objectionable practices as proved injurious to the busi-

ness, or tended to degrade it to the public.

Although under the exchange licenses they could be terminated by the Patents Company on fourteen days' notice, which provision, as we have before shown, was held valid by the Supreme Court of the State of New York and the Appellate Division, in the Greater New York Film Rental Company case, the Patents Company never cancelled any of such licenses without just cause.

It was compelled to terminate forty-two exchange licenses for cause. Thirty-two of these were cancelled between January, 1909, when the Motion Picture Patents Company began operations, and April 21, 1910, when the General Film Company was organized, the other twelve having been cancelled since April, 1910, or in a period of two years, ten being after June 6, 1910, when the General Film Company began active business. All of these were cancelled for violations of different conditions of these exchange licenses, which conditions were essential to the proper conduct of the business, and for dishonest and objectionable practices which proved injurious to the business or tended to degrade it to the public.

We have explained the reasons for cancellation

of the particular exchange licenses referred to by Mr. Grosvenor in his report, in our memorandum which we have heretofore furnished him, and which we have referred to in the beginning of this memorandum.

The General Film Company received a separate exchange license from the Patents Company for each place where it did business. It has found it could do the same business previously done by the fifty-seven exchanges whose property it had purchased, by forty-two exchanges operating as branches, thus cutting out the expense of fifteen exchanges.

It developed a system whereby it corrected the abuses that had crept into the old license exchange system, prevented the public from being inconvenienced in the way we have pointed out, and assured to licensed manufacturers and importers pay for the leasing of their motion pictures, and to the Patents Company its royalties for the use of the exhibiting machines licensed under its patents for use with motion pictures madeunder its authority.

Neither the General Film Company nor any of the managers of its branch exchanges, or any other of its em-

ployees is or ever has been interested in theatres or other exhibition places, either through ownership or by an interest in the box-office receipts, such company having lived up to the provisions of paragraph 15 of its agreement with the Patents Company, and its exchange licenses, which were intended to prohibit this, and which the owners of the licensed exchanges, as we have before shown, did not live up to. The injury to exhibitors caused by the actions of the owners of licensed exchanges, in this regard, heretofore referred to by us, has been thus eliminated.

The General Film Company has corrected the abuse of several theatres within a few blocks, and sometimes within one block, showing identical pictures on the same day, while other available pictures of equal or nearly equal interest were not shown at all in that neighborhood, by having its managers get up and supply dissimilar programmes to competing theatres, thus affording the public a variety of entertainment in the several theatres.

The General Film Company, through its managers, also rotates the supply of the more popular makes of moving pictures among its several competing customers, so that each

theatre in turn receives the favorite make of pictures without unfair discrimination, thus eliminating the abuses of the former licensed exchanges not carrying out their promises to furnish motion pictures at the times agreed upon, with reference to their age, counting from the release date.

The General Film Company does not permit its managers to supply exhibitors with motion pictures so worn and scratched as to be unsuitable for picture exhibition, which was the common practice with the old exchanges. Each branch exchange has appliances for repairing motion pictures, so far as they can be repaired, and such pictures are not allowed to be used unless they are capable of being used to give exhibitions satisfactory to the public.

The General Film Company, also, through its managers, makes up the programs for its customers in advance so that they may advertise the pictures they are to show from three to ten days in advance of the exhibition, thus eliminating the hardship to the exhibitor who was not, on account of the unsystematic methods of the old exchanges, able to advertise his programs in advance, or to let the public know what they might expect to see, or to give the public any information as to the time and place where any particular picture could be seen. This also enabled the public to select the

theatre it desires to patronize by reason of thespecial pictures to be exhibited.

As a result of the abuses we have before enumerated, and which the General Film Company has eliminated, the investment of capital by exhibitors was deterred and rendered hazardous. Motion picture exhibitions were largely confined tosmall store shows, requiring little investment.

Since the existence of the General Film Company and its system of management which has corrected the abuses and inconveniences to the public, a great impetus has been given to themotion picture exhibiting business, and fine large theatres are being erected all over the country; one in New York now going up will cost fully $500,000. Men of large means are finding the motion picture exhibiting business a safe and profitable field of investment, and the better class of people are deriving amusement and profit from the shows.

In the year 1909, a National Board of Censorship of motion pictures was formed at the instigation of thePeoples Institute and other societies of New York, to pass on all new motion pictures issued in this country. This board was and is composed of public spirited women and men, who serve without

any compensation whatever and who are not controlled or influenced in any way by the General Film Company, the Patents Company, or its licensed manufacturers and importers. It requested the Patents Company to have its licensed manufacturers and importers submit all new motion pictures to it for approval or rejection. The licensed manufacturers and importers acceded to the Patents Company's request, and contributed towards the clerical expenses of this board, while the Patents Company furnished a proper room, with a projecting machine and other apparatus, and an operator, for the purpose of exhibiting all of the new motion pictures issued by such manufacturers and importers. This censorship has been in operation continuously since that time, and where such board has objected to any particular picture for any reason, it has not been issued. This has resulted in an improvement in the motion picture business from the standpoint of morals, as they have plenary power, conferred by such manufacturers and importers, to condemn any motion picture.

As Mayor Gaynor, of New York City, in his letter of May 2nd last, to the Board of Aldermen, concerning the regulation of exhibitions of motion pictures, said:

> "These shows are a great solace and a source of much entertainment and education to the whole community. They are attended by all kinds of people, and

> especially by those who cannot afford to attend more expensive places of amusement. The pictures shown are moral and instructive. The great outcry of certain uninformed persons against themwhich existed not long ago has subsided. x x x "

The whole scheme of the Patents Company and the various agreements of the manufacturers and importers and the licensed exchanges has been approved by Judge Wellborn, in re Kay-Tee Film Exchange, in theUnited States District Court for the Southern District of California, August 21, 1911 (193 Fed. Rep. 140), where he affirmed the order of the referee based upon his findings, among which was the second, reciting the formation of the Patents Company, its ownership of thePatents, its license agreements with the manufacturers and importers, and its exchange license agreements, and the sixth, which is as follows:

> "(6) "That the agreements entered into and the statement of the patent situation show that there was a purpose andcombination on the part of all owners of inventions relating to motion pictures and motion picture projecting machines, or reels of films, to control their manufacture, sale, and price in all portions of the United States, but that such combination and the contracts made in reference thereto are legally valid and binding contracts such as might be reasonably made under the circumstances founded upon an adequate consideration, and that they embody no illegal restraints and are not repugnant to any rule of public policy as to restraint of trade or tending to create a monopoly, trust, or any other illegal combination."

Before the General Film Company was formed, the Patents Company had, for a long period of time, granted no

itself, it could have caused them to be manufactured by its licensed manufacturers and importers for it, and it could have leased them directly to the exhibitors on exactly the same terms and conditions as the General Film Company leases them. It would seem plain that what it could legally do itself it could authorize some one else to legally do. The Patents Company has no monopoly and cannot possibly have any monopoly in the motion picture business unless it is able to secure it legally under its patents.

The cases on which Mr. Grosvenor relies in his report have no relevancy to thepresent one.

We have shown that the Edison film reissue covers positive motion films ----------, and, therefore, the decision in the bath tub case (191 F.R. 172) has no application.

The indictments in what is known as the "Shoe Machinery Case" against certain natural persons, do not in the first count of the indictment (No. 114) which was upheld by Judge Putnam, anywhere disclose, that the acts complained of were done under the authority or in pursuance of the rights conferred by the patent laws, and, therefore, this case, and his decision sustaining this count of theindictment, has no applicability to the present case.

licenses for the establishing of new exchanges. There were at this time too many for the proper conduct of the business, and, as before pointed out, the General Film Company found it necessary to cease operations in fifteen places where exchanges had operated before it bought out their property.

The Patents Company owns no stock in the General Film Company. Only two of its directors are directors of the General Film Company out of the ten that manage its business. It cannot, therefore, by any possibility control the directors or the business of the General Film Company nor does it in any way attempt to do so.

The General Film Company is now doing precisely the same business that was done by the different license exchanges prior to the time it began business.

Neither it nor any of the exchanges which was licensed preceding it were restricted in any way to the prices at which motion pictures could be leased to exhibitors. These depended largely upon the newness of the subject and the time that it had been in the hands of the exchanges or exhibitors for exhibition purposes.

There can be no doubt that the Patents Company could, if it had chosen, lawfully acted as a rental exchange itself. As it did not manufacture the motion pictures.

CONCLUSION.

In conclusion we would say that the formation of the Patents Company was compelled in order to permit manufacturers and importers of motion pictures, and users of the same, in projecting machines, to lawfully do business, because of the patents owned by different interests, which would have otherwise prevented the lawful carrying on of such business, and the development of that business, which the freedom from litigation under the patents has caused.

The peculiar nature of the motion picture business required constant effort on the part of those producing the motion pictures, in order that they should be as perfect and as popular as was possible. The arrangements of the Patents Company, through its various agreements, and the General Film Company, has been an incentive to the production of the highest grade and of the best motion pictures, by reason of greater competition than ever existed before between the licensed manufacturers and importers. It is not on account of the existence of the Patents Company, or its various agreements, or of the General Film Company that any complaint has reached the Department, but the underlying reason is that through the system adopted by the Patents Company, the motion pictures produced by its various licensees have such high quality and

are so popular that those who were not willing to abide by its reasonable restrictions are now clamoring to get them, through the Department of Justice.

In addition, the system that has been inaugurated through the General Film Company has enabled these high class articles to be furnished to exhibitors, and the public to be entertained by them, in such a way that there is a diversity at all times, and the public is not subjected to the irritation of witnessing exhibitions of worn out picture film or moving pictures it has seen before, and it can always depend on having a new variety whenever it goes to any exhibition for the purpose of entertainment or instruction.

If the Department should undertake an action against the Motion Picture Patents Company and the General Film Company, and it succeeded, it would result in the three sets of patents going back to the original owners, the restoration of the conditions of numerous litigations under the patents, the uncertainty of anyone being able to engage in the business of making or exhibiting motion pictures without danger that such business would be interfered with by injunction, the removal of the incentive to the licensed manufacturers and importers to produce the highest grade of motion pictures, the condition as to the distribution of such motion pictures would be restored to that which existed

before the General Film Company was formed, the same abuses would creep in again, the exhibitors would suffer and their capital, of which large amounts are now invested on the strength of the present stability of the business, would be jeopardized, the public would be disgusted with the entertainments that would be presented, and the entire business would [illegible], [illegible] sums of money, and the great number of people, now employed in it would [illegible] seek other [illegible]. [illegible] of the Patents Company and the General Film Company are based [illegible] upon [illegible], in accordance with decisions [illegible] authorizing such arrangements. [illegible] the Patents Company and the General Film Company [illegible], have [illegible] under such patents.

We [illegible] that there should be any doubt in view of the [illegible] we have [illegible] about the legality of the Patents Company, and the General Film Company, and their various arrangements.

Respectfully submitted,

(Sgd.) [illegible] Phillips.

Francis T. [illegible].

New York, [illegible], 1910.